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Contracts

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CONTRACTS

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INTRODUCTION

Of the cases decided during the survey period involving contract issues, five appear worthy of review.[1] The most noteworthy case was decided under the *Uniform Commercial Code* and involved a warranty disclaimer and limitation of remedy provision. The Court held the contract clause unconscionable under the facts of the case, even if the contract was treated as arising in a commercial setting. The opinion is significant because unconscionability is rarely found in a commercial contract between merchants. Contract provisions are more frequently found to be unconscionable where one of the parties to the contract is a consumer. The second case involved the issue of whether a promise not reflected in a written contract containing an integration clause may be subject to an action for promissory fraud. The outcome of the case turned on whether the claimed fraud permitted the plaintiff to establish the promise by extrinsic evidence, thereby avoiding all proscriptions of the parol evidence rule.

The final three cases turned on the most litigated contract issue - contract interpretation. Each case involved the question of whether extrinsic evidence was admissible to interpret the language of the contract.

I. UNCONSCIONABILITY

In *Martin v. Joseph Harris Co.*,[2] the Sixth Circuit Court of Appeals applied Michigan law in a diversity action for breach of implied warranty of merchantability. The plaintiffs, Duane Martin and Robert Rick, were commercial farmers in Michigan, who separately ordered cabbage seed from the defendant, Joseph Harris Co.

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1. Those cases not reviewed were decided almost exclusively on the facts or on legal questions outside the contract arena.

2. 767 F.2d 296 (6th Cir. 1985).

(Harris Seed), a national producer and distributor of seed.[3] The order form supplied by Harris Seed and used independently by the plaintiffs included a clause disclaiming the implied warranty of merchantability and limiting buyer's remedies to the purchase price of the seed.[4] This clause is a standard clause used in the industry.[5]

After placing their seed orders in August of 1972, plaintiffs received Harris Seed's 1973 Commercial Vegetable Growers Catalog. On the lower right-hand corner of one page the catalog stated that Harris Seed was no longer "hot water"[6] treating cabbage seed. Plaintiff farmers planted their cabbage crops in the spring of 1973 using, among other seed, that cabbage seed which had been supplied by Harris Seed. In July, Harris Seed notified the farmers that the seed lot used to fill their orders was infected with black leg. Despite plaintiffs efforts to minimize the effect of the disease, large portions of the cabbage crops were destroyed. Although their crops were smaller than usual, plaintiffs did make a profit equal to or larger than previous years.[7]

In 1975, plaintiffs sued Harris Seed for negligence and breach of implied warranty of merchantability in connection with the sale of the diseased cabbage seed. The trial court ruled that the disclaimer of warranty and limitation of remedy clause[8] was unenforceable because it was unconscionable. A jury found for the defendant, Harris Seed, on both theories of negligence and implied warranty. Nonetheless, the trial court granted plaintiffs' motion for a judg-

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3. *Id.* at 298.

4. *Id.* at 298 n.1. The clause printed in the order form appeared as follows:

> Notice to Buyer: Joseph Harris Company, Inc. warrants that seeds and plants it sells conform to the label descriptions as required by Federal and State seed laws. IT MAKES NO OTHER WARRANTIES, EXPRESS OR IMPLIED, OF MERCHANTABILITY, FITNESS FOR PURPOSE, OR OTHERWISE, AND IN ANY EVENT ITS LIABILITY FOR BREACH OF ANY WARRANTY OR CONTRACT WITH RESPECT TO SUCH SEEDS OR PLANTS IS LIMITED TO THE PURCHASE PRICE OF SUCH SEEDS OR PLANTS.

Id. (This language also appeared on the seed packages and catalogs).

5. *Id.* at 298.

6. *Id.* Since 1947 hot water treatment was used to eradicate a fungus known as "black leg," which causes affected plants to rot before maturing.

7. *Id.* The market price for cabbage increased significantly in 1973, in part because the black leg epidemic reduced the amount of available cabbage.

8. *See supra* note 4.

ment notwithstanding the verdict on the implied warranty issue.[9] A second jury[10] awarded the plaintiffs, Martin and Rick, $36,000 and $16,000 respectively. The court of appeals affirmed the decision of the district court in all respects.[11]

In reaching its decision, the appellate court dealt accurately and concisely with three separate issues. First, the court examined whether under Michigan law warranty disclaimers which comply with U.C.C. section 2-316 are limited by the unconscionability provision of U.C.C. section 2-302.[12] Next, the court determined whether under the special facts of the case the disclaimer and remedy limitation clause was unconscionable under Michigan law.[13] Finally, the court of appeals addressed whether the district court erred in setting aside the jury verdict and granting the plaintiff's motion for a judgment n.o.v. on the breach of warranty theory.[14]

No Michigan case has resolved the question of whether a warranty disclaimer which meets the requirements of U.C.C. section 2-316 can be held unenforceable as unconscionable under U.C.C. section 2-302.[15] "There is no agreement among the commentators or among the courts on the question whether 2-316 preempts the field of warranty disclaimers and so excludes 2-302 from any operation here."[16] The debate concerning the applicability of the unconscionability section to warranty disclaimers was fueled, if not begun, by Professor Leff in his classic article on unconscionability.[17] The

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9. 767 F.2d at 298.

10. *Id.* The second jury was impaneled to hear only the issue of damages following the judgment n.o.v., *Id.*

11. *Id.* at 302-04. First, the appellate court affirmed the district court's finding of unconscionability. *Id.* at 302. Second, the court affirmed the district court's grant of plaintiff's motion for a judgment n.o.v. on the breach of implied warranty question, *Id.* at 304, after carefully examining five arguments advanced by the defendant. *Id.* at 302-304. The concurring opinion contains no specific dissent but states that the affirmance of unconscionability is based upon the unequal position of the parties. *Id.*

12. *Id.* at 299.

13. *Id.*

14. *Id.* at 302.

15. *Id.* at 299.

16. J. WHITE & R. SUMMERS, HANDBOOK OF THE LAW UNDER THE UNIFORM COMMERICAL CODE 478 (2d ed. 1980). It is interesting to note that even the hornbook authors, Professors White and Summers, do not agree on this question. One of them believes that the draftsmen of the U.C.C. never intended § 2-302 to be an overlay on the disclaimer provisions of § 2-316. *Id.* at 481.

17. Leff, *Unconscionability and the Code - The Emperor's New Clause*, 115. U. PA. L. REV. 485 (1967) [hereinafter Leff].

foundation of Leff's argument, as espoused by the defendant Harris Seed, is that section 2-316 unequivocably authorized disclaiming the implied warranty of merchantability.[18] In fact, the section sets forth clear, easy to meet standards for disclaiming warranties.[19] Section 2-316(2) details the specifics for disclaiming the implied warranty of merchantability as follows:

> Subject to subsection (3), to exclude or modify the implied warranty of merchantability or any part of it the language must mention merchantability and in case of a writing must be conspicuous, and to exclude or modify any implied warranty of fitness the exclusion must be by a writing and conspicuous. Language to exclude all implied warranties of fitness is sufficient if it states, for example, that "There are no warranties which extend beyond the description on the face hereof."[20]

In light of the detailed disclaimer instructions of the section and that neither the section nor its official comment contains any reference to section 2-302 or unconscionability, Professor Leff maintained that warranty disclaimers should not be stricken as unconscionable.[21] Nevertheless, most of the articles that examined section 2-302 and its applicability to warranty disclaimers have approved its application[22] as has the Sixth Circuit Court of Appeals in the instant case. While warranty disclaimers are not in themselves unconscionable under the Code, a particular disclaimer

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18. 767 F.2d at 299.

19. Leff, *supra* note 17, at 523.

20. U.C.C. § 2-316(2) (1977) (emphasis added).

21. One of Professor Leff's most convincing arguments that the draftsman never intended § 2-302 to apply to § 2-316 warranty disclaimers is the fact that § 2-316 contains no reference of any kind to § 2-302, although nine other sections of Article 2 contain such references (U.C.C. §§ 2-202, 2-204, 2-205, 2-207, 2-303, 2-508, 2-615, 2-718, 2-719). Leff, *supra* note 17, at 523. Reference to unconscionability in § 2-719 on limitation of remedies and in the Comments thereto is especially significant since a warranty disclaimer is often coupled with a limitation of remedy provision. The instant case is no exception. Harris Seed disclaimed the implied warranty of merchantability and limited the buyer's remedy to repayment of the purchase price of the seed. Code Comment 3 to § 2-719 provides that while a limitation of remedy provision may not operate in an unconscionable manner, a "seller in all cases is free to disclaim warranties in the manner provided in Section 2-316." U.C.C. § 2-719 comment 3 (1977). Accordingly, if warranty disclaimers are not subject to § 2-302, then in many cases even though the limited remedy would be deleted if unconscionable, the plaintiff would not have a cause of action in the absence of an express warranty.

22. *See* Ellinghaus, *In Defense of Unconscionability*, 78 Yale L.J. 757 (1969); Murray, *Unconscionability: Unconscionability*, 31 U. Pitt. L. Rev. 1 (1969); Spanogle, *Analyzing Unconscionability Problems*, 117 U. Pa. L. Rev. 931 (1969).

under special circumstances may be found to be unconscionable.[23] Section 2-302 provides that a court may find, as a matter of law, any clause of a contract to be unconscionable. Furthermore, most of the cases described in the Code Comments to section 2-302, as being illustrative of fact situations where its provisions would be applicable, are warranty disclaimer cases.[24] Finally, section 2-316 does not claim to be immune from the principle of unconscionability.[25]

The court of appeals holding that section 2-316 warranty disclaimers are subject to section 2-302 on unconscionability is significant precedent. The most similar Michigan case was *Mallory v. Conida Warehouses, Inc.*[26] In the *Mallory* case, the defendant sold kidney bean seeds to the plaintiffs, and the beans developed a disease known as halo blight.[27] The trial court found that the warranty disclaimer was ineffective and submitted the question of breach of implied warranty of merchantability to the jury. The trial court also found that the remedy provision limiting buyer's remedy to the price of the seed was unconscionable and, thus, the jury was instructed on the measure of damages including consequential damages. The jury found that the bean seed was defective and awarded money damages to the plaintiffs for crop loss. The Michigan appellate court affirmed the trial court.[28]

Therefore, while *Mallory* is similar to the instant case there is one major difference. In *Mallory*, the trial court did not address the question of whether the warranty disclaimer was unconscionable. The court never reached the question because it ruled that the warranty disclaimer was ineffective because it was not conspicuous and because the language used suggested that warranties were included rather than excluded.[29] In a number of cases courts have

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23. Ellinghaus, *supra* note 22, at 793-94.

24. The appellate court quotes from White & Summers that, in seven of the ten cases described in Comment 1 to § 2-302, disclaimers of warranty were denied full effect. 767 F.2d at 299.

25. *See* Ellinghaus, *supra* note 22, at 793-94; Murray, *supra* note 22, at 45; Spanogle, *supra* note 22, at 957.

26. 134 Mich. App. 28, 350 N.W.2d 825 (1984); *appeal denied* 422 Mich. 958, 372 N.W.2d 515 (1985).

27. 134 Mich. App. at 30, 350 N.W.2d at 827.

28. *Id.* at 33. 350 N.W.2d at 828. The dissent did not deal with the warranty disclaimer or limitation of remedy issues.

29. *Id.* at 31, 350 N.W.2d at 827.

not reached the question of application of section 2-302 to a warranty disclaimer, because of a finding that the disclaimer is ineffective for failing to be conspicuous as required by the U.C.C.[30] By reaching the question in the instant case and determining that section 2-302 is applicable to warranty disclaimers, the court of appeals has given disgruntled buyers a potential ground for recovery. Apparently, this result is consistent with the majority of courts having considered the question.[31] Nevertheless, it is still unlikely that numerous warranty disclaimers will be held ineffective as unconscionable, at least in a commercial setting where the relationship is not as one-sided as to give to one party the power to impose unconscionable terms on the other party.[32] In the instant case the court of appeals did not determine whether the plaintiff farmers were merchants, and thus, whether the transaction at issue occurred in a true commercial setting. The court held that the clause at issue was unconscionable even if considered in a "commercial setting."[33]

The major problem with predicting whether a court will find a contract clause to be unconscionable is the absence of a definitive standard for unconscionability. Section 2-302 on unconscionability provides:

> (1) If the court as a matter of law finds the contract or any clause of the contract to have been unconscionable at the time it was made the court may refuse to enforce the contract, or it may enforce the remainder of the contract without the unconscionable clause, or it may so limit the application of any unconscionable result.
> (2) When it is claimed or appears to the court that the contract or any clause thereof may be unconscionable the parties shall be afforded a reasonable opportunity to present evidence as to its commercial setting, purpose and effect to aid the court in making the determination.[34]

Thus, the Code section does not define unconscionability, nor are factors or elements of unconscionability enumerated.[35] Further-

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30. *See, e.g.*, Ford Motor Credit Co. v. Harper, 671 F.2d 1117 (5th Cir. 1982); Blankenship v. Northtown Ford, Inc., 95 Ill. App. 3d 303, 420 N.E.2d 167 (1981).

31. At least that was the conclusion of one commentator. Fahlgren, *Unconscionability: Warranty Disclaimers and Consequential Damage Limitations*, 20 St. Louis U.L.J. 435, 471 (1976).

32. White & Summers, *supra* note 16, at 474; 767 F.2d at 299-300.

33. 767 F.2d at 300 n.4.

34. U.C.C. § 2-302 (1977).

35. Duesenberg, *Practitioner's View of Contract Unconscionability*, 8 U.C.C. L.J. 237

more, courts have seldom explicitly defined the term "unconscionability." The definition most frequently used is the one found in an early English case stating that an unconscionable bargain is one "such as no man in his senses and not under delusion would make on the one hand, and as no honest and fair man would accept on the other."[36] Accordingly, most courts have looked to the code comment for guidance. The Comment states that the principle underlying the unconscionability section is "one of prevention of oppression and unfair surprise . . . and not the disturbance of allocation of risks because of superior bargaining power."[37]

This language has caused a debate among the courts and commentators as to whether the relative bargaining power of the parties is even a proper consideration under section 2-302.[38] Virtually an equal number of cases can be found to say that inequality of bargaining power is not a consideration,[39] or that the relative bargaining power of the parties is a factor to consider in determining whether the clause or contract is unconscionable.[40]

In *Martin*, the trial court relied upon a Michigan Court of Appeals decision, *Allen v. Michigan Bell Telephone Co.*,[41] for a standard of unconscionability. In *Allen*, emphasis was placed upon the relative bargaining power of the parties to determine whether a limitation of remedy provision was unconscionable.[42] Thus, the court of appeals in *Martin* was faced with selecting a side in the debate over the significance of bargaining power. The Sixth Circuit Court of Appeals agreed with the district court, in holding that relative bargaining power is an appropriate consideration in determining unconscionability under the Michigan Uniform Commercial Code.[43]

(1976).

36. The equity court standard was adopted in the early English case of *Earl of Chesterfield v. Janssen*, 2 Ves. Sr. 125, 28 Eng. Rep. 82, 100 (Ch. 1750). The standard set forth in that case was adopted by the United States Supreme Court in *Hume v. United States*, 132 U.S. 406 (1889).

37. U.C.C. § 2-302 comment 1 (1977).

38. 767 F.2d at 300.

39. *See, e.g.*, State v. Avco Fin. Serv. of New York, Inc., 429 N.Y.S.2d 181, 406 N.E.2d 1075 (1980).

40. *See e.g.*, Leonedas Realty Corp. v. Brodowsky, 454 N.Y.S.2d 183, 115 Misc.2d 88 (1982).

41. 18 Mich. App. 632, 171 N.W.2d 689 (1969).

42. *Id.* at 637-40.

43. 767 F.2d at 301.

In the opinion of this commentator, the court of appeals took the correct side. Clearly, inequality of bargaining power without more is not enough to establish unconscionability.[44] If it were enough, courts would constantly be forced to reallocate the economic risks of contracts because even in a commercial setting size and monopoly strength create unequal bargaining positions. However, "[i]f inequality of bargaining power exists, the inquiry is whether the inequality resulted in unfair surprise through misleading bargaining techniques or oppression through inclusion of one-sided terms."[45] The inquiry is whether the clause is so one-sided as to be unconscionable under circumstances existing at the time of the making of the contract.

As analyzed by the court of appeals, the circumstances of the instant case did amount to unfair surprise and oppression. Although the clauses in question had appeared in previous seed order forms, Harris Seed's decision to discontinue hot water treatment of its cabbage seed substantially altered the final contract of the parties. Because of the latent nature of the defect and the sudden change in standard practice with the notice of such change being given after the seed order was placed, Harris Seed had a duty to bring the clause to the attention of the plaintiffs.[46] As enunciated in the *Johnson v. Mobil Oil Corp.*,[47] where a contracting party has immense bargaining power with an uncounseled layperson, there is an affirmative duty to obtain voluntary, knowing assent.[48] Given the unique facts of the instant case, the court of appeals affirmed the district court's finding of unconscionability.[49]

In addressing the final issue on appeal, whether the district court erred in granting the plaintiffs' motion for judgment n.o.v. on the breach of implied warranty issue, the appellate court consid-

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44. *See*, Discount Fabric House of Racine, Inc. v. Wisconsin Telephone Co., 113 Wis.2d 258, 334 N.W.2d 922 (1983); Lamoille Grain Co., Inc. v. St. Johnsburg and Lamoille County R.R., 135 Vt. 5, 369 A.2d 1389 (1976).

45. Comment, *Disclaimer of Implied Warranties from a Manufacturer's Perspective*, 80 Dick. L. Rev. 566, 581 (1976).

46. 767 F.2d at 301.

47. 415 F. Supp. 264 (E.D. Mich. 1976). This case was in Hipp, *Contracts: Annual Survey of Michigan Law*, 24 Wayne L. Rev. 397 (1978). The survey correctly indicates that the *Johnson* case is "significant because it refuses to follow the overly strict general rule that unconscionability does not apply to contracts between merchants." *Id.* at 409.

48. 415 F. Supp. at 269.

49. 767 F.2d at 302.

ered five arguments advanced by the defendant.[50] Two of these arguments are worthy of discussion. First, Harris Seed argued that there is no breach of implied warranty of merchantability where there is no economic loss. Defendants claim since plaintiffs made as much profit as in previous years, despite the fact that large portions of their cabbage crops were destroyed, they were not damaged. This argument has a carnival shell game flavor to it - it mixes together two distinct legal questions and confuses the resolution. The amount of damage suffered is not relative to whether there was a breach of implied warranty of merchantability. Under the implied warranty of merchantability section,[51] "a plaintiff must prove (1) that a merchant sold goods, (2) which were not 'merchantable' at the time of sale, and (3) injury and damages to the plaintiff or his property (4) caused proximately and in fact by the defective nature of the goods, and (5) notice to seller of injury."[52] The cabbage seed was defective, it was diseased, and that disease destroyed large portions of the plaintiffs' property - the cabbage crops. The cabbage crop loss was proximately caused by the defective cabbage seed. To say that the defective seed caused the plaintiffs to make a greater profit because of the market shortage of cabbage and, thus, plaintiffs were not damaged, is to permit and encourage sale of diseased seed. The court of appeals correctly found that there was a breach of implied warranty of merchantability. Since the court did not know what the market price for cabbage would have been had the plaintiffs been able to harvest their entire crop disease free, the court computed these damages on the basis of the market price when they sold the salvageable cabbage.

The other argument presented by Harris Seed which is of some interest relates to the Michigan Seed Law.[53] Harris Seed argued that there could be no breach of implied warranty under the U.C.C. because the state seed law preempts the field and sets forth the full extent of a seed merchant's obligations.[54] The court of ap-

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50. *Id.* at 302-04.

51. U.C.C. § 2-314 (1977).

52. *See* White & Summers, *supra* note 16, at 343.

53. Mich. Comp. Laws § 286.701-716 (1967).

54. 767 F.2d at 303. Harris Seed argued that since the Michigan Court of Appeals case relied upon by the district court was being appealed to the Michigan Supreme Court, the Court of Appeals decision was stayed and inapplicable. The case was Mallory v. Conida

peals correctly found that sale of seeds is subject to the provisions of the Uniform Commercial Code.[55] The Michigan Seed Law is merely a disclosure statute requiring that certain labels be placed on seed and enumerating penalties for failure to comply with the statute's requirements.[56]

In conclusion, *Martin* is a significant case for Michigan jurisprudence because of its application of the unconscionability doctrine to a warranty disclaimer in a commercial setting. However, whether it will be used extensively in commercial cases is yet undecided. The plaintiffs in *Martin* were farmers, and farmers, although capable of acquiring merchant status,[57] continue to be classified and treated with consumers rather than merchants.[58] The overwhelming majority of cases where warranty disclaimers have been held unconscionable involve consumers and farmers.[59]

Warehouse, Inc., and as previously noted in note 26, leave to appeal was denied by the Michigan Supreme Court. *See supra* note 26.

55. 767 F.2d at 303.

56. *See, e.g.*, MICH. COMP. LAWS. § 286.705 (1967), which sets forth the information required on a label or tag where the contents are vegetable, herbs or flower seed.

57. A farmer is not per se a merchant. Rush Johnson Farms, Inc. v. Missouri Farmers Ass'n. Inc., 555 S.W.2d 61 (Mo. App. 1977). Under specific circumstances, that seem to vary from jurisdiction to jurisdiction, farmers may be merchants. *See, e.g.*, Sebasty v. Perschke 404 N.E.2d 1200 (Ind. App. 1980); Cargill, Inc. v. Gaard, 84 Wis.2d 138, 267 N.W.2d 22 (1978); Continental Grain Co. v. Harbach, 400 F. Supp. 695 (D. Ill. 1975). This commentator is unaware of any published Michigan appellate court opinion dealing with the potential merchant status of a farmer. However, it is interesting to note that a pre-Code Michigan case discussed by Roy L. Steinheimer, Jr., in the practice commentary to § 2-302 in *Michigan Compiled Laws Annotated*, involved the purchase of seed by a farmer. The case is cited as one which would today potentially be decided under the unconscionability provision. In that case, the Michigan Supreme Court refused to enforce the seller's disclaimers of warranty and held the seller responsible for the farmer-buyer's crop loss. *See* Phelps v. Grand Rapids Growers, Inc., 341 Mich. 62, 67 N.W.2d 59 (1954).

58. A commentator, in a three part article on the farmer's status as a merchant, pointed out that it is our romantic ideals concerning the rugged individualism of the American farmer, that has lead courts to be protective of the farmer and shrink from acknowledging his merchant status. Squillante, *Is He or Isn't He a Merchant?-Farmer*, 82 Com. L.J. 155, 367, 430 (1977).

59. Many of the so-called commercial setting cases involving warranty disclaimers being held unconscionable involve farmers and in most cases the farmer is suing because of defective or diseased seed. For a case similar to the instant case, *see*, Rottinghaus v. Howell, 35 Wash. App. 99, 666 P.2d 899 (1983). In a corn seed case, the court found the seller liable for a breach of express warranty based upon language on the seed bags. The warranty disclaimer was inconsistent with the express warranty and so the warranty was unenforceable. However, the limitation of remedy provision, limiting lawyer's recovery to the sale price of the seed corn, was held not to be unconscionable. Tharalson v. Pfizer Genetics, Inc., 728 F.2d 1108 (8th Cir. 1984).

II. Promissory Fraud

The facts in *Coal Resources, Inc. v. Gulf & Western Industries, Inc.*,[60] are extremely sketchy. However, it appears that the plaintiff, Coal Resources, held leases on certain property in Virginia. Defendant, Gulf & Western, pursuant to an acquisition agreement, was to develop the lease-holds and assume all duties, express or implied, arising under those leases.[61] Defendant's performance was significant since Coal Resources was to receive a multiple of Gulf & Western's profits during the first two years after the signing of the acquisition agreement.[62] The extent of defendant's obligations under the acquisition agreement was the subject of the dispute.

Plaintiff asserted claims in the United States District Court in Ohio alleging (1) breach of contract; (2) promissory fraud; and (3) violations of federal securities law. A jury found defendant liable on all claims, awarding in excess of $28,000,000. Plaintiff subsequently accepted a remittance of $12,050,000 as full compensation for all jury awards.[63] The district court also granted defendant's motion for judgment n.o.v. on the securities claim.[64]

On appeal, the Sixth Circuit Court of Appeals in an unpublished opinion[65] affirmed the judgment n.o.v. on the securities claim, and reversed and remanded for new trial on the other claims. Plaintiff filed a petition for rehearing and the instant opinion resulted. On rehearing the majority affirmed the judgment n.o.v. on the securities law claim, reversed the judgment on the promissory fraud claim, and vacated the judgment and remanded for a new trial on the breach of contract claim.[66]

In reviewing the instant case, three issues appear worthy of review. First, whether a promise not reflected in a written contract containing an integration clause may be subject to an action for promissory fraud. Second, whether implied obligations not directly reflected in a written contract containing an integration clause may be the subject of an action for breach of contract. Finally, whether

60. 756 F.2d 443 (6th Cir. 1985).
61. 756 F.2d at 449.
62. *Id.* at 448.
63. *Id.* at 445.
64. *Id.*
65. 738 F.2d 438 (6th Cir. 1984).
66. 765 F.2d at 451-52.

the plaintiff obtained a double recovery by receiving a damage award reflecting the benefit of bargain and the monetary equivalent of contract rescission, stemming from a finding of liability on both the breach of contract and the promissory fraud causes of action.

The first issue dealing with promissory fraud is the most interesting and the one over which the dissenter disagrees most vehemently. Plaintiff alleged that defendant promised to invest $3.9 million in the leaseholds, with knowledge that the promise would not be performed. The promise was not included in the written acquisition agreement which contained an integration clause.[67] The court of appeals defined promissory fraud as a contractual promise made with no present intention of performing it.[68] Even though extrinsic evidence is admissible to show promissory fraud,[69] the court invoked the parol evidence rule since the written contract contained an integration clause.[70]

In arriving at this rule of law, that extrinsic evidence is inadmissible to establish a promissory fraud theory when the contract contains an integration clause, the majority opinion cited no authority.

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67. *Id.* at 446.

68. *Id.* In support of its definition the court cited Dunn Appraisal Co. v. Honeywell Information Sys., Inc., 687 F.2d 887 (6th Cir. 1982) (construing Ohio law) and Tibbs v. National Homes Const. Corp., 52 Ohio App. 2d 281, 369 N.E.2d 1218 (1977). The *Tibbs* case accurately explains the law of promissory fraud in Ohio and a majority of jurisdictions as follows:

> It is generally true that fraud cannot be predicated upon promises or representations relating to future actions or conduct.
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> Sometimes referred to as an excepton to this rule - although in reality simply an application of the rule to extended facts - is the instance of the malfactor who makes his promise of future action, occurrence, or conduct, and who at the time he makes it, has no intention of keeping his promise. *In such a case, the requisite misrepresentation of an existing fact is said to be found in the lie as to his existing mental attitude and present intent.* (emphasis added).

52 Ohio App.2d at 286-287, 369 N.E.2d at 1222-23.

In summary, since fraud must relate to existing facts, it is said that fraud cannot be predicated upon a promise relating to future actions. However, the general rule is that a promise made without the intent to perform it is fraud. Sweet, *Promissory Fraud and the Parol Evidence Rule*, 49 Cal. L. Rev. 877, 888 (1961).

69. 756 F.2d at 446. The court of appeals cited *Globe Steel Abrasive Co. v. National Metal Abrasive Co.*, 101 F.2d 489 (6th Cir. 1939), which provides "[I]t is likewise the general rule that a promise made with present intention not to perform is a misrepresentation of an existing fact which may be shown by extrinsic evidence to have induced the execution of the contract, and so be a ground for avoiding it." *Id.* at 491.

70. 756 F.2d at 447.

Instead, the majority merely distinguished *Dunn*,[71] relied upon by the plaintiff and the court in defining promissory fraud. The majority stated that *Dunn* is distinguishable because the *Dunn* opinion does not indicate that an integration clause was involved. The majority viewed this promissory fraud theory as an attempt to add terms to an integrated agreement.[72] Accordingly, the majority used the parol evidence rule as a bar to the extrinsic evidence and found defendant entitled to judgment as a matter of law on the promissory fraud claim.[73]

Judge Morton, in dissent, argued that the parol evidence rule does not bar evidence of fraudulent inducement because the evidence is offered not to add or vary the terms of the contract, but to avoid it all together, including the integration clause.[74] The dissent cited numerous cases for this proposition.[75] The majority opinion answered the dissent in a footnote, arguing that those cases are inapplicable because the case at bar did not involve a claim of fraud in the inducement, but instead promissory fraud.[76]

Authorities do not agree on whether an integration bars proof of promissory fraud.[77] However, a majority of jurisdictions now treat

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71. *See supra* note 68.

72. This commentator will discuss *infra* whether adding the $3.9 million development promise to the acquisition agreement was the intention of the plaintiff. Case law differs as to whether the only relief available in a promissory fraud cause of action is rescission or avoidance of the entire contract. *See* Sweet *supra*, note 68, at 900.

73. 756 F.2d at 447.

74. *Id.* at 452.

75. Betz Laboratories, Inc. v. Hines, 647 F.2d 402 (3d Cir. 1981); Centronics Financial Corp. v. El Conquistador Hotel Corp., 573 F.2d 779 (2d Cir. 1978); Niehaus v. Haven Parke West, Inc., 2 Ohio App. 3d 24, 440 N.E.2d 584 (1981). The Niehaus case involved allegations that misrepresentations induced the appellants to enter into a contract which contained a merger clause. The Ohio court held that a merger clause could not prevent the admissibility of evidence of fraud, quoting from the Ohio legal encyclopedia as follows:

> It is a general rule that where one party to a contract has been induced to enter into it through fraud, deceit, and misrepresentation of the other party as to material matters, the defrauded party does not become bound by its terms, notwithstanding the contract contains a provision that there are no agreements or statements binding upon the parties except those contained therein. Fraud which enters into the actual making of a contract cannot be excluded from the reach of the law by any formal phrase inserted in the contract itself.

Id. 2 Ohio App. 3d at _____, 440 N.E.2d at 586.

76. 756 F.2d at 452 n.2.

77. *See*, Metzger, *The Parol Evidence Rule: Promissory Estoppel's Next Conquest?* 36 Vand. L. Rev. 1383, 1400 (1983), (citing J. CALAMARI & J. PERILLO, THE LAW OF CONTRACTS 112 n.77 (1977)).

the making of promises without intent to perform as the equivalent of a misrepresentation of fact and, thus, treat such misrepresentations like fraud in the inducement.[78] Ohio is recognized by *Tibbs* as one of those majority jurisdictions.[79] Furthermore, in *Niehaus*, cited in the dissenting opinion, the Ohio Court of Appeals held that a merger or integration could not be used to exclude extrinsic evidence that a contract had been induced by fraud, deceit, and misrepresentation.[80] Accordingly, it appears that the dissent was correct and evidence of promissory fraud, which is treated as fraud in the inducement, is admissible even in the face of a merger or integration clause.

The second issue worthy of review involves the breach of contract cause of action. Plaintiff's breach of contract theory was three-fold.[81] Defendant was alleged to have breached an implied obligation to develop the leaseholds in a reasonably diligent fashion according to generally accepted mining principles. Defendant was alleged to have breached certain duties imposed by the leases, which defendant expressly assumed in the acquisition agreement. Finally, defendant was alleged to have breached express promises contained in the acquisition agreement.

The court of appeals held that implied obligations not directly reflected in a written contract containing an integration clause are not enforceable. The clear impact of the integration clause was that neither party was bound to discharge obligations not contained in the written agreement. Accordingly, the court held that a duty to develop the property in a reasonable diligent fashion may

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78. J. CALAMARI & J. PERILLO, *supra* note 77, at 286-87; Sweet, *supra* note 68, at 888-89. An excellent synopsis may be found in Professor Farnsworth's hornbook on Contracts as follows:

> It is generally agreed that the parol evidence rule does not bar extrinsic evidence to show fraud as a ground for rescission, a tort action for damages, or reformation. Most courts treat promissory fraud like other types of fraud for this purpose. However, a few courts have held that the parol evidence rule bars extrinisc evidence of promissory fraud. (footnotes omitted)

E. ALLAN FARNSWORTH, CONTRACTS 465-6 (1982).

79. *See supra* note 68.

80. *See supra* note 75 for the discussion of the *Niehaus* case. The contract in that case contained the following merger clause: "This Agreement and the Exhibits attached hereto . . . contain the entire agreement between the parties hereto . . . and supercede all prior arrangements or understandings between the parties hereto relating to the subject matter hereof." *Niehaus*, 2 Ohio App. 3d at _____, 440 N.E.2d at 586.

81. 756 F.2d at 448.

not be implied under the acquisition agreement.[82] Thus, defendant's failure to perform according to generally accepted mining principles could not form the basis of a breach of contract action under this implied theory.

Judge Morton again dissented, arguing that an implied duty of this nature is to be read into a written contract absent an express provision to the contrary.[83] Again the dissent seems to have taken the better position. The parol evidence rule, after all, merely excludes extrinsic evidence of prior and contemporaneous negotiations and agreements of the parties.[84] It does not speak to terms implied in a contract by law. Implied in law terms are such that they are attached to the contract on grounds of policy without any expression by the parties.[85] Were this not the case, an integration clause could bar such implied terms as good faith and commercial reasonableness in a written contract governed by the U.C.C. Such a result would be unsupportable.

Ironically, despite the majority's finding on the implied term, the court found potential for liability under plaintiff's alternative theory of breach of contract, that defendant had failed to perform duties imposed by the leases. Emphasizing the two distinct questions posed, the court reiterated its position that the integration clause prevented obligations from being implied under the acquisition agreement. However, in that agreement, defendant expressly assumed all duties, express or implied, arising from the leases. The leases required development of the property in a "diligent, workmanlike manner" in accordance with the standards of good mining practice.[86] Thus, defendant was potentially liable under this theory for the same behavior that had been rejected as a basis for the earlier implied theory of liability.

With respect to the final issue, the majority and dissent agree that the plaintiff obtained a double recovery by receiving benefit of

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82. *Id.*

83. *Id.* at 453. Judge Morton cited the Ohio case of Beer v. Griffith, 61 Ohio St.2d 119, 399 N.E.2d 1227 (1980), for the proposition that in the absence of an express provision to the contrary, a mineral lease includes an implied covenant to reasonably develop the land. The generalized integration clause fell short, in his opinion, of being the type of express provision needed to rebut this presumed duty.

84. 3 A.L. CORBIN, CORBIN ON CONTRACTS § 573 (1960).

85. 3 A.L. CORBIN, CORBIN ON CONTRACTS § 579 at 412 (1960).

86. 756 F.2d at 450.

the bargain damages on the contract breach and the monetary equivalent of contract rescission through its promissory fraud theory.[87] The court held that a plaintiff may not have a contract both enforced and rescinded at the same time. The dissent suggested that bifurcating the issues of liability and damages would solve the problem. Under bifurcation, if the defendant were liable for both promissory fraud and breach of contract, the plaintiff would be forced to declare the theory of liability under which it wished to proceed, and seek damages accordingly.[88] However, the majority's reversal of the promissory fraud claim and remanding of the breach of contract claim rendered the issue moot in this case.

By way of comment, the problem does arise because the typical remedy is avoidance of the contract and rescission where fraud in the inducement of a contract is claimed.[89] However, Professor Sweet's article on promissory fraud and the parol evidence rule discussed at length the potential remedies available where promissory fraud is alleged and established.[90] The typical remedy, and the only remedy available in some jurisdictions, is rescission of the contract and restoration of the status quo.[91] However, in many instances the courts have allowed the victim of a false promise to either sue for damages in a tort action of deceit, or affirm the contract and sue for its breach.[92]

Although mooted by the majority's decision, by applying the alternative remedies to the instant case it would have been possible for the plaintiff to recover tort damages on the promissory fraud claim and breach of contract damages on the contract claim. Furthermore, since the $3.9 million development promise was not covered by the written agreement, it might be possible to enforce that promise separately as a collateral agreement and recover on both theories without it being viewed as a duplicative recovery. This latter result would appear to be exactly what the majority was avoiding by using the parol evidence rule as a bar where it appeared

87. *Id.* at 446, 453.

88. *Id.* at 453.

89. *See supra* note 69.

90. Sweet, *supra* note 68.

91. Sweet, *supra* note 68 at 897. The article discusses why such a limitation is not desirable. *Id.* at 899.

92. *Id.* at 900. Professor Sweet's article stated that there are quite a few cases that allow an action for damages sounding in tort. *Id.* at 891-92 n.79.

that the plaintiff wished to add the oral fraudulent promise to the written agreement.

III. Contract Interpretation

The final three cases involve the troublesome, frequently litigated problem of contract interpretation. In all three cases the court of appeals affirmed application of or applied the plain meaning rule[93] to the language of three different agreements. In applying this much criticized rule[94] the court held that three words: "amendment," "method" and "complete" were ambiguous and should be interpreted in light of their plain meaning rather than in light of the proposed extrinsic evidence.

In the first case, *Union Oil Co. of California v. Service Oil Co., Inc.*,[95] Union brought its cause of action against Service for nonpayment under a jobber sales agreement and against Hugh E. Mays, Sr., who had executed a separate guaranty agreement rendering him personally liable for all extensions of credit by Union to Service. Factually, Mays signed the guaranty agreement on April 11, 1975. Later, on August 1, 1975, Union entered into a jobber sales agreement with Service, a distributor of gasoline products in Knoxville, Tennessee, whereby Service would resell the products purchased from Union to local service stations.[96]

In 1978, Union withdrew from the Knoxville retail gasoline market and sold its company-owned service stations to Service. As part of the sale on February 12, 1978, Union entered into a new jobber sales agreement. Union and Service signed an agreement cancelling

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93. The "plain meaning" rule developed in the field of statutory interpretation as well as contract interpretation. "The concept of the plain meaning of language appears to have retained more vitality in the field of contract interpretation than in the area of statutory interpretation." Farnsworth, *supra* note 78, at 501. Under this plain meaning rule, evidence of prior negotiations may be used for the purpose of interpretation only if the language in the writing is unclear, in the sense of being ambiguous or vague. *Id.* at 502. "[I]f a writing appears clear and unambiguous on its face, its meaning must be determined by the four corners of the instrument without resort to extrinsic evidence of any nature." J. Calamari & J. Perillo, Contracts 98 (1970).

94. *See* J. Calamari & J. Perillo, Contracts at 98 n. 32 (1970) (citing Corbin, Grismore, McCormick and Thayer). Also note that the Uniform Commercial Code and the Restatement Second of Contracts explicitly condemn the plain meaning rule. U.C.C. § 2-202 comment 1(c) (1977); Restatement (Second) of Contracts § 202 and comments (1979).

95. 766 F.2d 224 (6th Cir. 1985).

96. *Id.* at 225.

the 1975 jobber sales agreement on March 7, 1978. No new guaranty was signed at that time, and Union on several occasions asked Mays to sign a new guaranty.[97] Union filed this cause of action in November of 1983, after Service began falling behind in its payments, and Union terminated the 1978 jobber sales agreement on December 19, 1983.[98]

Mays defended the action based upon an allegation that his guaranty was terminated by the 1978 cancellation agreement.[99] Mays produced an affidavit which stated that Union representatives told him that the 1978 cancellation terminated the guaranty. Mays' agreement and affidavit were rejected by the trial court as "self-serving parol evidence," and the court granted summary judgment against both defendants for the amount of the debt.[100] Defendants filed a motion to be relieved of the summary judgment because of newly discovered evidence, but the trial court refused to grant the motion because the defendants failed to show due diligence as required by the rule. The rejected new evidence consisted of an affidavit by Charles Venable who represented Union during the 1978 negotiations of the jobber agreement. The affidavit stated that Venable was told by union to inform Mays of the cancellation of Mays' guaranty and that he had so informed Mays.[101]

On appeal, the key issue was whether the 1978 cancellation agreement also terminated the guaranty agreement. Mays relied on the following language from the cancellation agreement: "[T]he undersigned parties hereby mutually agree that [the jobber sales] agreement, and *any amendments thereto* shall be and the same hereby are cancelled and terminated. . . (emphasis added)."[102] Thus Mays argued that the word "amendments" referred to and included the guaranty. Mays maintained that his affidavit presented a factual question as to the meaning of the word

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97. *Id.*

98. *Id.* By February of 1984 Service owed Union more than $350,000 under the 1978 agreement.

99. *Id.*

100. *Id.* at 226. The major problem was that the guaranty specified the manner under which it could be terminated. Termination of the guaranty required written notice and payment of any amount then owed on the jobber contract. Mays did not comply with these requirements.

101. *Id.*

102. *Id.*

"amendments."[103]

The Sixth Circuit Court of Appeals applied Tennessee law which provides that "parol evidence is not admissible to interpret a contract when there is no ambiguity on the face of the contract."[104] The court of appeals held that there was no ambiguity in the word "amendments." Amendments are modifications that postdate a contract and the personal guaranty was executed prior to the 1975 jobber agreement.[105] Furthermore, the court held that the word "amendments" could not have included Mays' guaranty because the parties to the two agreements were different.[106] Consequently, the intent of the parties as to the meaning of the contract terms was determined from the face of the contract, thereby excluding Mays' affidavit and any other parol evidence on the intention of the parties. The case was ultimately reversed and remanded on a completely separate issue involving a federal rule of civil procedure.[107]

In the second case, *Whitaker-Merrell Co. v. Profit Counselors, Inc.*,[108] the Sixth Circuit Court of Appeals applied Ohio law to determine whether the word "method," as used in the Action Report of May 4, was ambiguous. Plaintiff, Whitaker-Merrell, is a general contractor in the construction industry and the defendant, Profit Counselors, is a professional business consultation firm. Defendant represented to the plaintiff that it could improve plaintiff's job cost system, particularly the overhead allocation system. Accordingly, the parties entered into a written contract in March of 1979, whereby defendant would advise the plaintiff and develop an overhead allocation method for its bidding procedure. Plaintiff used the overhead allocation method provided by defendant and also

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103. *Id.* at 227.

104. The appellate court accurately cited two Tennessee cases upholding the plain meaning rule. Cartwright v. Giacosa, 216 Tenn. 18, 390 S.W.2d 204 (1965); McMillin v. Great Southern Corp., 480 S.W.2d 152 (Tenn. Ct. App. 1972). Numerous recent cases can be found reaffirming the viability of the plain meaning rule in Tennessee. *See e.g.*, Jones v. Brooks, 696 S.W.2d 885 (Tenn. 1985); Farmers and Merchants Bank v. Petty, 664 S.W.2d 77 (Tenn. App. 1983); Pierce v. Flynn, 656 S.W.2d 42 (Tenn. App. 1983); Coble Sys., Inc. v. Gifford Co., 627 S.W.2d 359 (Tenn. App. 1981); Ward v. Berry and Assocs., Inc., 614 S.W.2d 372 (Tenn. App. 1981); Moore v. Moore, 603 S.W.2d 736 (Tenn. App. 1980).

105. 766 F.2d at 227.

106. *Id.*

107. *Id.* at 228.

108. 748 F.2d 354 (6th Cir. 1984).

used the exact percentage markups supplied by an employee of defendant in acquiring fifty-seven construction projects.[109] In 1980, one of plaintiff's in-house accountants informed management that the percentage markups provided by defendant were too low, and that as a result plaintiff failed to recover $177,000 in overhead on the fifty-seven jobs.[110]

Plaintiff brought this cause of action to recover the loss. Profit Counselors defended on the basis that its only obligation under the contract was to develop an overhead allocation method and the actual percentage markups supplied were meant to be illustrative only.[111] At the close of plaintiff's case-in-chief, the trial court directed a verdict for the defendant on the grounds that the contract required defendant to provide a method for overhead allocation only, the contract did not require defendant to provide actual percentage markups and those markups supplied were meant to be illustrative only.[112] The court of appeals affirmed the trial court's directed verdict.[113]

The Sixth Circuit Court of Appeals ruled that the word "method" was not ambiguous.[114] The plaintiff argued that the word was ambiguous in order to admit parol evidence to show that method was intended to include both an overhead allocation program and the actual percentage markups to be used in the calculations. The court of appeals cited an old Ohio case reiterating the exception to the plain meaning rule of contract interpretation

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109. *Id.* at 355.

110. *Id.*

111. *Id.*

112. *Id.* at 356.

113. *Id.*

114. *Id.* at 357. The case is unusual because the word "method," subject to interpretation here, appeared in an Action Report drafted almost two months after the operating agreement, which this commentator believes is the contract of the parties. Accordingly, the court applied this rule of contract interpretation to a report written subsequent to the contract. Probably, the best argument plaintiff presented was that the parties' agreement was a mixed oral and written contract. The court refused to adopt this agrument in light of the integration clause which appeared in the "operating agreement" as follows: "Profit Counselors, Inc. and the Client accept this Operating Agreement as constituting the entire agreement between them with respect to all services to be rendered by Profit Counselors, Inc. to the client and its compensation therefor." 748 F.2d at 356. That the contract at minimum consisted of several writings, the operating agreement and subsequent action reports, is accepted by the court of appeals in its analysis.

where an ambiguity is found.[115] Recent Ohio cases may be cited to support the proposition that the plain meaning rule is alive and well in Ohio.[116] Accordingly, the court of appeals in this diversity action applied the correct, albeit criticized,[117] rule of law.

In the third case involving contract interpretation, *J.I. Hass, Co. v. Jones-Teer*,[118] the Sixth Circuit Court of Appeals applied Kentucky law[119] to resolve the issue of whether a subcontractor, in taking over a job already begun by a previous subcontractor, was entitled to extra compensation for correcting the work of the previous subcontractor. Jones-Teer was the prime contractor for the construction of the Smithland Dam on the Ohio River. Jones-Teer originally engaged All-State Contracting Company to paint the steel gates of the dam. All-State commenced the painting in 1977, but a dispute arose at the end of 1978 and All-State removed itself from the project.[120] Hass contracted with Jones-Teer to "complete"[121] the painting job. After Hass began painting, defects were discovered in the painting previously done by All-State. Hass contended that it was entitled to extra compensation for the corrective work. Jones-Teer declined to pay Hass' claims for additional compensation, upon the ground that the subcontract required Hass to complete all painting at its own expense.[122] Judgment was rendered in favor of Hass for $17,920 for work performed by Hass before termination of the subcontract and all other claims were

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115. *Id.* at 357. The court of appeals cited Ohio Crane Co. v. Hicks, 110 Ohio St. 168, 143 N.E. 388 (1924). It is somewhat unusual that this case is cited as the only authority for two reasons. First, the case involves an ambiguous contract or an exception to the plain meaning rule. Second, numerous recent Ohio cases can be found reciting the plain meaning rule of contract interpretation. *See infra* note 116 for a listing of these cases.

116. *See e.g.*, John Deere Indus. Equip. Co. v. Gentile, 9 Ohio App. 3d 251, 459 N.E.2d 611 (1983); Ranieri v. Terzano, 8 Ohio App. 3d 438, 457 N.E.2d 906 (1983); Pippin v. Kern-Ward Bldg. Co., 8 Ohio App. 3d 196, 456 N.E.2d 1235 (1982).

117. *See supra* note 94.

118. 755 F.2d 1264 (6th Cir. 1985).

119. Two suits were filed. Hass brought the first action in the United States District Court for New Jersey and the second in the United States District Court for the Western District of Kentucky. The New Jersey action was transferred to the Western District of Kentucky where the two suits were consolidated for trial. *Id.* at 1265.

120. The dispute between Jones-Teer and All-State was settled by arbitration. *Id.* at 1265 n. 1.

121. "Complete" is the key word because the court had to decide whether the contract was ambiguous as to the scope of the work and whether "complete" meant go forward with the job or additionally do corrective work. *Id.* at 1266.

122. *Id.* at 1265.

dismissed.[123] Both parties appealed and the Sixth Circuit Court of Appeals affirmed.[124]

The trial court struggled with the dilemma of contract interpretation and preliminarily ruled, at the close of the first phase of the trial, that the subcontract was ambiguous with respect to the scope of the work. Based upon the parol evidence presented, the district court determined that Hass was only responsible for going forward with the painting.[125] Jones-Teer petitioned the court to re-examine this preliminary finding of ambiguity and the trial court changed its original holding. Recognizing that the work could not be completed unless the Corps of Engineers' specifications were satisfied, the trial court reversed itself and ruled that the scope of the work requirement was clear, not ambiguous, and that Hass was to do all work required for the dam to be painted pursuant to the contract specifications.[126] The court of appeals affirmed the trial court's construction of the contract.[127]

In affirming the issue the court of appeals did not discuss the standard applied by either court in interpreting the contract. One can only surmise, based upon the use of the term ambiguous, that the courts were applying the plain meaning rule.[128] The trial court's inconsistent decisions on the question of ambiguity only further emphasize the importance of using extrinsic evidence in resolving questions of contract interpretation.[129]

The court of appeal's opinion dealt with another issue of significance to contract law. In addition to ambiguity, Hass further alleged misrepresentation in the formation of the contract.[130] Hass

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123. *Id.* at 1266.

124. *Id.*

125. *Id.* Thus, under the preliminary ruling Hass was not responsible for any corrective work.

126. *Id.* at 1267.

127. *Id.*

128. This commentator could find no Kentucky case digested which explicity adopts the plain meaning rule. Several cases hold that in the absence of ambiguity a written instrument will be enforced strictly according to its terms. O'Bryan v. Massey-Ferguson, Inc., 413 S.W.2d 891, 893 (Ky. 1967); Codell Const. Co. v. Commonwealth of Kentucky, 566 S.W.2d 161, 164 (Ky. App. 1977). *See also,* Indian Refining Co. v. Baker, 284 Ky. 423, 145 S.W.2d 72 (1941), providing that the interpretation of the parties should prevail only when the contract sought to be construed is ambiguous. 284 Ky. ____, 145 S.W.2d at 74.

129. One questions how the trial court could change its decision without examining the extrinsic evidence, specifically the intentions of the parties at the time of the contracting.

130. 755 F.2d at 1267. Hass alleged fraud in the initial suit. On appeal, Hass accepted

had received assurances from Jones-Teer and American States Insurance Company[131] that the completed painting was satisfactory,[132] thus, Hass had a reasonable expectation that All-State's work was properly performed. The Sixth Circuit Court of Appeals relied on district court Judge Edward H. Johnstone's analysis of the facts created by the unexpected extensive remedial work. Judge Johnstone opined that the status of the painting previously done by All-State was misrepresented by Jones-Teer and American States.[133] Once Hass knew or had reason to know of the misrepresentation, the contract became voidable. At that point Hass was faced with a choice of either rescinding the contract due to the mispresentation, or ratifying the contract, completing the painting, and later seeking damages.[134] Hass had one irrevocable election; Hass could not avoid part of the contract and ratify part of the contract.[135] An aggrieved party has but one election, either disaffirm the contract and seek its rescission or affirm the contract and seek a remedy by an action for damages.[136]

In conclusion, the three cases involving contract interpretation were correctly decided under the current law of Ohio, Tennessee and Kentucky. These cases are noteworthy, not because they change the law, but because they reaffirm a rule of law which has been almost universally criticized - the plain meaning rule.[137] Since the rule has been abrogated by both the *Restatement (Second) of Contracts*[138] and by the *Uniform Commerical Code*,[139] it is surpris-

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the trial court's determination of misrepresentation rather than fraud. *Id.*

131. *Id.* at 1265. American States Insurance Comapny acted as surety for All-State on their sub-contract with Jones-Teer.

132. *Id.*

133. *See supra* note 130.

134. 755 F.2d at 1267.

135. RESTATEMENT (SECOND) OF CONTRACTS § 383 (1979) provides: "A contract cannot be avoided in part except that where one or more corresponding pairs of part performances have been fully performed by one or both parties the rest of the contract can be avoided." *Id.* Thus, a party cannot disaffirm part of the contract that is particularly disadvantageous to himself while affirming a more advantageous part. This rule is in accord with Kentucky law. *See, e.g.*, Dunn v. Tate, 268 S.W.2d 925 (Ky. 1954).

136. Hampton v. Suter, 330 S.W.2d 402, 406 (Ct. App. Ky. 1959).

137. *See supra* note 94.

138. RESTATEMENT (SECOND) OF CONTRACTS § 202(1) (1979), dealing with rules in aid of interpretation provides in relevant part: "Words and other conduct are interpreted in the light of all the circumstances, and if the principal purpose of the parties is ascertainable it is given great weight." *Id.* The comment in explanation speaks to the absence of a requirement of ambiguity:

ing that it remains the law in many jurisidictions.

> With a decline in the judicial reverence for the written word and with a growing recognition that the meaning of language may vary greatly according to circumstances, it has become increasingly difficult to defend the restrictive view [the plain meaning rule], even though that view may tend to shorten the judicial process. If it is recognized that all language is infected with ambiguity and vagueness and that even language that seems on its face to have only one possible meaning may take on a different meaning when circumstances are disclosed, it makes little sense for a court to ask whether language is on its face "ambiguous" or "vague" as opposed to "clear" or "plain."[140]

With time, undoubtedly, the plain meaning rule will be discarded. However, for now we must face the reality that the court will substitute its own linguistic education and experience for that of the contracting parties,[141] ignoring in some instances the true intentions of those parties.

> The rules in this Section are applicable to all manifestations of intention and all transactions. *The rules* are general in character, and serve merely as guides in the process of interpretation. They *do not depend upon any determination that there is an ambiguity*, but are used in determining what meanings are reasonably possible as well as in choosing among possible meanings.

Id. at § 202 comment a (emphasis added). Furthermore, RESTATEMENT (SECOND) OF CONTRACTS § 214 (1979) provides in relevant part: "Agreements and negotiations prior to or contemporaneous with the adoption of a writing are admissible in evidence to establish . . . (c) the meaning of the writing, whether or not integrated." *Id.*

The comment then by way of explanation provides:

> Words, written or oral, cannot apply themselves to the subject matter. The expressions and general tenor of speech used in negotiations are admissible to show the conditions existing when the writing was made, the application of the words, and the meaning or meanings of the parties. Even though words seem on their face to have only a single possible meaning, other meanings often appear when the circumstances are disclosed.

Id. at § 214 comment b.

139. The U.C.C. comment provides:

> 1. *This secion definitely rejects*:
>
> (a) Any assumption that because a writing has been worked out which is final on some matters, it is to be taken as including all the matters agreed upon;
>
> (b) The premise that the language used has the meaning attributable to such language by rules of construction existing in the law rather than the meaning which arises out of the commerical context in which it was used; and
>
> (c) *The requirement that a condition precedent to the admissibility of the type of evidence specified in paragraph (a) is an original determination by the court that language used is ambiguous.*

U.C.C. § 2-202 comment 1 (1977) (emphasis added).

140. F.A. FARNSWORTH, *supra* note 78 at 506-07.

141. 3 A.L. CORBIN, CORBIN ON CONTRACTS, § 542 at 111 (1960).